No. 12-15737

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL E. DAVIS, aka Tony Davis, et al.,
Plaintiffs-Appellees,

v.

ELECTRONIC ARTS INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
The Honorable Richard Seeborg
Case No. 10-cv-03328-RS

MOTION OF 27 INTELLECTUAL PROPERTY AND CONSTITUTIONAL LAW PROFESSORS FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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MOTION

1. This case turns on a fundamental question: what limits does the First Amendment place on the right of publicity, at least outside the context of commercial advertising?

2. This is a largely novel question (focusing on non-commercial-advertising speech, and thus setting aside the discussion in *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), and *White v. Samsung Electronics Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc). Though cases such as *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010), touched on this question in some measure, this Court had not deeply delved into it until *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* ("*Keller v. Electronic Arts*"), 724 F.3d 1268 (9th Cir. 2013), the case on which the panel decision in this case relies. No petition for rehearing en banc was filed in *Keller*. Whether or not to revisit *Keller* is therefore something that this Court must consider for the first time.

3. This First Amendment question is also quite complex. Other circuits, as well as state supreme courts, have confronted it and given

markedly different answers; the proposed *amici* brief discusses some of those answers. Moreover, as the brief discusses, though *Keller* and the decision below purport to adopt the California Supreme Court's approach to the First Amendment question, they actually end up substantially departing from that approach.

4. The question is also practically important. As the proposed *amici* brief discusses, the question arises not just with video games, but with films, books, songs, television programs, and more. Content-creation industries, many of which are largely headquartered in the Ninth Circuit, need guidance about what materials they are or are not free to publish.

5. And proposed *amici* are particularly knowledgeable about this question, as well as the more specific points raised in the proposed brief. They are professors of intellectual property law and constitutional law who have taught or written about the freedom of speech and the right of publicity; here is a complete list of their names and institutional affiliations (the latter listed for identification purposes only):

Jack Balkin	Yale Law School
Barton Beebe	NYU School of Law
Stacey L. Dogan	Boston Univ. School of Law
Gregory Dolin	Univ. of Baltimore School of Law
Eric M. Freedman	Hofstra Univ. School of Law
Brian L. Frye	Univ. of Kentucky College of Law

William T. Gallagher	Golden Gate Univ. School of Law
Jon M. Garon	Nova Southeastern Univ. Law Center
Jim Gibson	Univ. of Richmond School of Law
Eric Goldman	Santa Clara Univ. School of Law
Stacey M. Lantagne	Univ. of Mississippi School of Law
Mark A. Lemley	Stanford Law School
Lawrence Lessig	Harvard Law School
Raizel Liebeler	John Marshall Law School
Barry P. McDonald	Pepperdine Univ. School of Law
Tyler Ochoa	Santa Clara Univ. School of Law
Aaron Perzanowski	Case Western Reserve Univ. School of Law
Lisa P. Ramsey	Univ. of San Diego School of Law
Martin H. Redish	Northwestern Univ. School of Law
Betsy Rosenblatt	Whittier Law School
Jennifer E. Rothman	Loyola Law School, Los Angeles
Steven H. Shiffrin	Cornell Univ. School of Law
Christopher Jon Sprigman	NYU School of Law
Geoffrey R. Stone	Univ. of Chicago Law School
Rebecca Tushnet	Georgetown Univ. Law Center
Eugene Volokh	UCLA School of Law
David Welkowitz	Whittier Law School

Some of their articles that discuss limits on the right of publicity include:

- Stacey Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 Stan L. Rev. 1161 (2006).
- William T. Gallagher, *Strategic Intellectual Property Litigation, the Right of Publicity, and the Attenuation of Free Speech: Lessons from the Schwarzenegger Bobblehead Doll War (and Peace)*, 45 Santa Clara L. Rev. 581 (2005).

- Jon M. Garon, *Playing in the Virtual Arena: Avatars, Publicity, and Identity Reconceptualized Through Virtual Worlds and Computer Games*, 11 Chap. L. Rev. 465 (2008).
- Jon M. Garon, *Beyond the First Amendment: Shaping the Contours of Commercial Speech in Video Games, Virtual Worlds, and Social Media*, 2012 Utah L. Rev. 607.
- Bruce P. Keller & Rebecca Tushnet, *Even More Parodic than the Real Thing: Parody Lawsuits Revisited*, 94 Trademark Rep. 979 (2004).
- Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998).
- Lisa P. Ramsey, *Intellectual Property Rights in Advertising*, 12 Mich. Telecomm. & Tech. L. Rev. 189 (2006).
- Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. Davis L. Rev. 199 (2002).
- Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 Geo. L.J. 185 (2012).
- Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903 (2003).

- David S. Welkowitz & Tyler T. Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech*, 45 Santa Clara L. Rev. 651 (2005).
- David S. Welkowitz & Tyler T. Ochoa, *Celebrity Rights: Rights of Publicity and Related Rights in the United States and Abroad* (Carolina Academic Press 2010).
- David S. Welkowitz, *Catching Smoke, Nailing Jell-O to a Wall: The Vanna White Case and the Limits of Celebrity Rights*, 3 J. Intell. Prop. L. 67 (1995).
- David S. Welkowitz, *Privatizing Human Rights? Creating Intellectual Property Rights from Human Rights Principles*, 46 Akron L. Rev. 675 (2013).

6. For these reasons, proposed *amici* believe that their brief—which deals squarely with the core question presented in this case—would be useful to this Court's deliberations, and they therefore seek this Court's leave to file the brief.

Dated: Jan. 29, 2015

s/ Eugene Volokh
Attorney for Proposed *Amici Curiae*
Law Professors

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on Jan. 29, 2015.

All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: Jan. 29, 2015

s/ Eugene Volokh
Attorney for Proposed *Amici Curiae*
Law Professors